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Supreme Court, U.S.
FILED
MAR 29 2000
CLERK

No. 99-699

IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA AND
MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,

PETITIONERS,

v.

JAMES DALE,

RESPONDENT.

On Writ of Certiorari to the
Supreme Court of New Jersey

BRIEF OF *AMICUS CURIAE* STATE OF NEW JERSEY IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether application of the New Jersey Law Against Discrimination to Boy Scouts of America, a place of public accommodation as defined in New Jersey law, violates Petitioners' right of intimate or expressive association under the First Amendment to the United States Constitution.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The State of New Jersey submits this brief in support of respondent James Dale. As the entity statutorily responsible for implementing and enforcing New Jersey's Law Against Discrimination, the State of New Jersey believes it imperative that this Court affirm the judgment of the New Jersey Supreme Court that Boy Scouts of America[1] may not exclude James Dale on the basis of his sexual orientation.

As amply demonstrated by the record below, BSA seeks and attracts broadly based membership and solicits sponsorship from the widest range of social organizations, including government entities. Indeed, hundreds of scout troops in New Jersey are sponsored by government entities. A ruling allowing an organization of this scope and with this level of engagement with government to discriminate will severely compromise the ability of the State to enforce its civil rights laws in contexts involving the protection of not just sexual orientation, but every class of our most vulnerable citizens.

New Jersey has always been at the forefront of civil rights enforcement. Its Law Against Discrimination, N.J. Stat. Ann. § 10:5-1 *et seq.*, ("LAD"), enacted in 1945, anticipated federal legislation by twenty years and was the first civil rights law of its kind in the nation. The LAD prohibits discrimination in housing, employment, and places of public accommodation. Its ambit has expanded over the years to reflect the halting progress of tolerance in New Jersey's most diverse of societies. Accordingly, the law now forbids discrimination because of race, creed, color, national origin, ancestry, age, sex, marital status, sexual orientation, familial status and nationality. The LAD has prohibited discrimination on the basis of sexual orientation since 1992.

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[1] In this brief, "Boy Scouts of America" and "BSA" denote both petitioners Boy Scouts of America and Monmouth Council, Boy Scouts of America.

The State of New Jersey is a strong defender of the rights of private groups to expressive and intimate association under the First Amendment. Indeed, the anti-discrimination protections afforded by the LAD are balanced explicitly against private First Amendment interests. The act provides exceptions to its protections for distinctly private clubs and institutions, religious educational facilities, and those acting *in loco parentis*.

BSA's claim to the right to exclude James Dale based solely on his sexual orientation must be evaluated, ultimately, in light of the public participation sought and obtained by the organization. In addition to its large size and nonselective membership policies, BSA seeks government assistance, enjoys statutorily conferred benefits, and solicits government sponsorship. In its public advertising and membership solicitations, BSA does not hesitate to publicize its close historical ties with government. New Jersey schools, law enforcement agencies, fire companies, city governments and National Guard units sponsor 750 scouting troops. BSA reinforces this close relationship to government among scouts, conferring merit badges for "citizenship" based on familiarity with the Declaration of Independence, the Constitution and the Bill of Rights; scouts also pledge to respect and obey the law and to deal fairly and kindly with fellow citizens of whatever race or creed, in the spirit of America's tradition of equality of opportunity.

Statutory privileges, free use of public parks, schools, camp grounds and other facilities, and government sponsorship have conferred on BSA a benefit far more fundamental than just financial and logistical assistance. As a consequence of government participation and sponsorship, the actions and policies of BSA bear a stamp of legitimacy, an imprimatur based on government's tacit endorsement. Those excluded based on the BSA's discriminatory practices may well feel the shame and sting of an entire society's rebuke.

The State of New Jersey has an undeniable and compelling interest in applying its anti-discrimination laws to a large, diverse, and nonselective organization that exploits its close ties to government while espousing, largely in response to litigation, a policy that every branch of New Jersey government has condemned as invidious. The State submits this brief in support of James Dale because, in its view, New Jersey's compelling interest outweighs any interest of the BSA in expelling James Dale.

STATEMENT OF THE CASE

Throughout his long and decorated association with Boy Scouts of America, James Dale embodied Boy Scout ideals. Beginning at age 8, he progressed through the ranks of scouting, from Tenderfoot through Eagle Scout, an achievement attained by roughly the top 3 percent of all scouts; he later served as an Assistant Scoutmaster.

At some point during these years, James Dale acknowledged to himself that he is homosexual. The revelation of his sexual identity in a newspaper article having to do with problems facing students at Rutgers University, and which made no mention of his involvement in scouting, led to his expulsion from BSA in 1990. Notably, Dale was not expelled from BSA for any behavior deemed inappropriate for scouts. Rather, Dale's expulsion was grounded in BSA's undistributed, litigation-inspired policy targeting "known or avowed" homosexuals. *See Dale v. Boy Scouts of America*, 160 N.J. 562, 579, 734 A.2d 1196, n.4 (1999).

BSA is a not-for-profit corporation that charters hundreds of other not-for-profit corporations nationwide, including in New Jersey, to support scouting programs. BSA charters and approves only those sponsors that are compatible with the aims and purposes of the organization. Since 1992, when the LAD was amended to prohibit discrimination based on sexual orientation, BSA has in no way severed its ties with the

government. Furthermore, throughout its history, BSA has repeatedly renewed the charters of religious and government organizations adhering to divergent views regarding homosexuality and related moral issues.

After his requests for reinstatement were denied, James Dale filed a complaint in the Superior Court of New Jersey, Chancery Division, in 1992 seeking various forms of relief against BSA. In his lawsuit, Dale alleged that BSA violated the LAD and New Jersey common law by revoking his scout membership based solely on his sexual orientation. The trial court denied Dale's motion for partial summary judgment and granted BSA's motion, dismissing Dale's complaint in its entirety. On appeal, a majority of the Superior Court of New Jersey, Appellate Division reversed the trial court's dismissal of the complaint, holding that BSA constitutes a "place of public accommodation" under the LAD, that BSA did not qualify for any statutory exemption from LAD coverage, and that BSA violated the LAD by concededly denying Dale the privilege of serving in the organization based solely on his sexual orientation. *Dale v. Boy Scouts of America*, 308 N.J. Super. 516, 706 A.2d 270 (App. Div. 1998).

On review, the Supreme Court of New Jersey unanimously affirmed the Appellate Division's majority ruling. *Dale*, *supra*, 734 A.2d 1196. In so affirming, the New Jersey Supreme Court cited ample precedent and evidence in the record to support its conclusion that BSA is a "place of public accommodation" despite the absence of a permanent site at which scouts regularly meet. *Id.* at 1208-10.

The New Jersey Supreme Court's decision that BSA falls within the purview of the LAD follows a long line of decisions defining the term "public accommodation." *See*, *e.g.*, *Frank v. Ivy Club*, 120 N.J. 73, 576 A.2d 241 (1990), *cert. denied sub nom. Tiger Inn v. Frank*, 498 U.S. 1073 (1991) (holding that Princeton University's eating clubs,

although not owned or operated by the university, itself a place of public accommodation, were so closely related to it as to subject them to the LAD); *Fraser v. Robin Dee Day Camp*, 44 N.J. 480, 210 A.2d 208 (1965) (day camp is a place of public accommodation); *Clover Hill Swimming Club v. Goldsboro*, 47 N.J. 25, 219 A.2d 161 (1966) (swim club is a public accommodation, and although it can limit access to the facilities to members, it cannot discriminate in the selection of members); *Sellers v. Philip's Barber Shop*, 46 N.J. 340, 348, 217 A.2d 121 (1966) (barber shop is a place of public accommodation and cannot refuse customers on the basis of race). In each of these cases, the State of New Jersey played a prominent role in enforcing the statute. Moreover, the courts acknowledged the unique remedial nature of the State's anti-discrimination law. In light of the LAD's aim toward the eradication of the "cancer of discrimination," the statute has always been interpreted, as intended, liberally. *Fuchilla v. Layman*, 109 N.J. 319, 334, 537 A.2d 652 (1988), *cert. denied sub nom. University of Medicine and Dentistry of N.J. v. Fuchilla*, 488 U.S. 826 (1988); *Jackson v. Concord Co.*, 54 N.J. 113, 124, 253 A.2d 793 (1969). *See also National Organization for Women v. Little League Baseball*, 67 N.J. 320 (1974) (exclusion of girls from playing Little League Baseball violated the LAD, and absence of permanent, fixed "place" was not dispositive.)

The New Jersey Supreme Court identified various factors to be considered in determining whether BSA is a place of public accommodation:

> We ask, generally, whether the entity before us engages in broad public solicitation, whether it maintains close relationships with the government or other public accommodations, or whether it is similar to enumerated or other previously recognized public accommodations. [*Dale*, 734 A.2d at 1210.]

The court then evaluated the many decidedly public features of BSA in light of these standards. *See*, *e.g.*, *id.* at 1210-18. In this regard, the court found that BSA engages in broad and aggressive public solicitation activities of the sort that have consistently been a principal characteristic of public accommodations in New Jersey. *Id.* at 1211. Such public solicitation includes the extension of general membership invitations through broadcast and print advertising, public service announcements, posters, promotions and recruiting drives, none of which advertise the exclusion of homosexuals. *Id.* As indicated in the record below, "[n]either the charter nor the bylaws of the Boy Scouts of America permits the exclusion of any boy. The National Council and Executive Board have always taken the position that scouting should be available to all boys who meet the entrance age requirements." *Id.* at 1215 (quoting BSA publication entitled, "A Representative Membership").

Indeed, it is not disputed that BSA spends millions of dollars modernizing scouting's image in order to encourage as many boys as possible to become scouts. An additional form of public recruitment intentionally employed by the BSA to increase awareness and membership involves individual scouts commonly wearing their uniforms to school and other public places. *Id.* at 1211. The court concluded that BSA closely resembles many of the recognized and enumerated places of public accommodation under the LAD. *Id.* at 1213 (likening BSA to such established LAD public accommodations as Little League baseball and day camps).

Throughout its analysis, the court stressed that BSA benefits considerably from the close relationships it maintains with federal and state governmental bodies and with other recognized public accommodations. *Id.* at 1211. Boy Scouts of America is federally chartered and receives an array of federal, state and local government sponsorship that outfits scouts with a wide variety of facilities, equipment, supplies and services. For example, the federal government has

authorized various federal agencies to provide BSA with goods and services, including medical supplies, cots, blankets, commissary equipment, flags, refrigerators and other supplies, without reimbursement. *Id.* at 1212 (quoting 10 U.S.C. § 2544(a)).

On the state level, New Jersey provides a similarly broad range of benefits to BSA, including authorization for its environmental protection agency to stock with fish any body of water used by Boy Scouts, N.J. Stat. Ann. § 23:2-3, and an exemption for payment of motor vehicle registration fees, N.J. Stat. Ann. § 39:3-17. Moreover, New Jersey public schools and school-affiliated groups sponsor close to 500 scouting units, comprising approximately one-fifth of the chartering organizations in the State. Some schools even allow scout meetings to be held during the school day as part of their curriculum. *Dale*, *supra*, 734 A.2d at 1213. Other governmental entities, such as law enforcement agencies, fire departments, city governments, and the military, sponsor approximately 250 scouting units in New Jersey. *Id.* at 1201.

The New Jersey Supreme Court also considered and rejected BSA's claim that, despite its longstanding close engagement with government and other factors demonstrating that it is a public accommodation, the organization is exempt from the LAD. The LAD contains several express exceptions, including exceptions for distinctly private clubs and institutions, religious educational facilities, and those acting *in loco parentis*, to safeguard the First Amendment rights of truly private groups. N.J. Stat. Ann. § 10:5-5(l). Focusing primarily on BSA's large size, close ties to government, inclusive membership policy, and lack of selectivity in membership, among other factors, the New Jersey Supreme Court rejected Petitioners' claim that BSA is "distinctly private." *Dale*, *supra*, 734 A.2d at 1217.

The court further concluded that BSA does not constitute a "religious educational facility" within the meaning of the

LAD's exception for such facilities because BSA's own pronouncements clearly demonstrate that the organization is not a *bona fide* religious or sectarian institution. *Id.* Nor could BSA be eligible for the LAD's *in loco parentis* exception, since scout leaders do not have the requisite responsibility to maintain, rear and educate children such that they stand in the place of the parent. *Id.* at 1218.

After holding that the LAD applies to BSA, the court next turned to BSA's claim that its First Amendment rights are thereby violated. *Id.* at 1219. As part of its detailed intimate association analysis, the New Jersey Supreme Court carefully considered, among other things, BSA's size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship. *Id.* at 1221. The court concluded on the record before it that BSA's large size (more than 87 million members since its inception), unlimited membership, nonselectivity (*e.g.*, BSA does not require new members to be sponsored by current members), admittedly inclusive rather than exclusive purpose, and the practice of inviting or allowing nonmembers to attend meetings, established that the organization is not sufficiently personal or private to warrant constitutional protection under the freedom of intimate association. *Id.* at 1222.

With regard to expressive association, the court carefully weighed New Jersey's compelling state interest in eradicating invidious, status-based discrimination against BSA's First Amendment interests. *Id.* at 1223. Recognizing that a group member infringes upon an organization's freedom of expressive association only if he or she significantly affects the other members' ability to preserve or advocate their viewpoints, the court found on the record before it that scouts do not associate in order to preserve or advocate the view that homosexuality is immoral. *Id.* at 1223-24. To the contrary, BSA discourages its leaders from disseminating any views on sexual issues, and BSA includes sponsors and members who subscribe to different views regarding issues such as

homosexuality and tolerance. *Id.* at 1223, 1225. Accordingly, the court concluded that Dale's expulsion from BSA was based solely on his status as a homosexual and was not justified by any demonstrated need to preserve BSA's expressive rights. *Id.* at 1228. The New Jersey Supreme Court specifically noted that the LAD, like other similar statutes in other jurisdictions, serves a compelling state interest and accomplishes that purpose without abridging BSA's free speech or associational rights. *Id.*

SUMMARY OF ARGUMENT

The New Jersey Supreme Court's interpretation of the LAD to include BSA as a place of public accommodation does not violate BSA's rights of free association or free expression under the First Amendment. New Jersey has an undeniable, compelling interest in protecting the civil rights of all those who reside within its borders. BSA, on the other hand, is unable to demonstrate that it seeks, as one of its purposes, to bring scouts together to share or express views on sexual orientation, and that inclusion of James Dale will alter irretrievably the core "views that brought [the Scouts] together." *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

The New Jersey Supreme Court's holding, on the record before it, that BSA satisfies the LAD's well-settled definition of a "place of public accommodation," but does not fall within any of statute's exceptions, involved a straightforward application of established law to the facts of record. Under the LAD, public accommodations may not discriminate against individuals based solely on their sexual orientation, just as they may not, for example, discriminate based upon race, creed, color, age, sex or national origin.

The many factors supporting the conclusion that BSA is a place of public accommodation under the LAD are largely the same as the factors to be considered with respect to BSA's

First Amendment claims. As a large, inclusive, nonselective organization having undeniably close relationships with state and federal governmental bodies, BSA clearly meets the definition of a place of public accommodation. Among BSA's most distinctly public characteristics are its longstanding, purposeful engagement with government and its receipt of wide-ranging public benefits.

Recognizing BSA as a place of public accommodation in no way implicates a legitimate interest in intimate association. That right involves the sharing of beliefs within relationships that are based on a special community of thought; such relationships characteristically center on distinctly personal aspects of members' lives. Once again, selectivity is a factor to be considered along with size, purpose and exclusivity. Under the circumstances of this case, BSA can claim the right of intimate association for its members on neither a local nor a national level.

With regard to BSA's claim that its right to free expressive association is compromised under the New Jersey Supreme Court's decision, the critical issue is whether the group gathers in furtherance of a collective purpose that would be frustrated by inclusion of the excluded member. In this case, the record below amply demonstrates that scouts do not gather for the purpose of sharing their views on sexual orientation, nor does the fact of Dale's status as homosexual force BSA to articulate any particular message that differs from the message it has historically espoused. Accordingly, application of the LAD to BSA does not have a significant impact on members' ability to associate in order to pursue shared views.

ARGUMENT

APPLICATION OF THE NEW JERSEY LAW AGAINST DISCRIMINATION TO BSA DOES NOT VIOLATE PETITIONERS' RIGHT OF INTIMATE OR EXPRESSIVE ASSOCIATION UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. The State of New Jersey has a Compelling Interest in Eradicating Discrimination in Places of Public Accommodation, Like BSA.

New Jersey unquestionably enjoys "broad authority to create rights of public access on behalf of its citizens." *Roberts*, *supra*, 468 U.S. at 625 (compelling Jaycees to accept women as full voting members) (citing *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81-88 (1980)). In consistently holding that a state has a "compelling interest of the highest order" in "eliminating discrimination and assuring equal access to its citizens," this Court has made clear that a state may define the scope of its compelling interest as long as it does so through neutral laws of general applicability "unrelated to the suppression of ideas," and any incidental infringement on First Amendment freedoms is no greater than is essential to the furtherance of that interest. *See*, *e.g.*, *New York State Club Ass'n v. New York City*, 487 U.S. 1, 13 (1988) (applying anti-discrimination law to a consortium of private clubs that regularly provided services to nonmembers did not significantly affect members' ability to form associations to advocate public or private viewpoints); *Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (applying anti-discrimination law to Rotary Club "plainly serves" state's "compelling interests of the highest order" in eliminating discrimination); *Romer v. Evans*, 517 U.S. 620, 635 (1996) (state constitutional amendment prohibiting state and local legislative bodies from providing anti-discrimination

protection based on sexual orientation was too broad to be justified by the stated goal of preserving the associational freedoms of landlords and employers to share religious and philosophical beliefs disfavoring homosexuality); *Crawford v. Board of Educ. of Los Angeles*, 458 U.S. 527, 542 (1982) (states may go beyond requirements of the Federal Constitution in their anti-discrimination laws).

Like many other similar civil rights statutes nationwide, the LAD is a neutral law of general applicability that serves compelling state interests. Enacted in 1945, the New Jersey Law Against Discrimination is the oldest state civil rights law in the nation. Promulgated pursuant to the State's police power, the statute was adopted "for the protection of the public safety, health and morals and to promote the general welfare and in fulfillment of the Constitution of this State guaranteeing civil rights." N.J. Stat. Ann. § 10:5-2. In the statute, the New Jersey Legislature expressly declared that discrimination against individuals "threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State . . . ." N.J. Stat. Ann. § 10:5-3. In furtherance of its goal to eradicate the severe personal and societal damage caused by bias, it directed that the "act shall be liberally construed in combination with other protections available under the laws of this State." *Id.*

Throughout its fifty-five-year history, the LAD has been amended many times to broaden the scope of its protection. The law now forbids discrimination in housing, employment and places of public accommodation based on race, creed, color, national origin, ancestry, age, sex, marital status, sexual orientation, familial status and nationality.[2] N.J. Stat.

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[2] Although BSA claims that affirmance of the New Jersey Supreme Court's decision would necessarily mean that "Boy Scout Troops would be forced to admit girls" and "Girl Scout Troops would be forced to admit boys," Pet. bf. at 37, this ignores an important exemption in the public accommodations provision of the LAD: the law expressly does not "bar any place of public accommodation which is in its nature reasonably restricted exclusively to one sex" from discriminating on the basis of sex in its accommodations. N.J. Stat. Ann. § 10:5-12f. Such exemption includes, but is not limited to, "any summer camp, day camp, or resort camp, bathhouse, dressing room, swimming pool, gymnasium, comfort station, dispensary, clinic or hospital, or school or educational institution which is restricted exclusively to individuals of one sex." *Id.*

Ann. § 10:5-4. Since 1992, that list has included sexual orientation. *Id.*; N.J. Stat. Ann. § 10:5-5hh; L. 1991, c. 519, § 3. The statute defines the term "place of public accommodation" with a series of examples, such as hotels, camps, stores, restaurants, theaters and the like, although it is clearly stated that the list is not intended to be exhaustive. N.J. Stat. Ann. § 10:5-5(1). The public accommodation section of the LAD includes several express exceptions, including exceptions for "distinctly private" organizations, religious educational facilities and those acting *in loco parentis*. *Id.*

A threshold issue below, therefore, was whether BSA is a place of public accommodation within the meaning of the LAD; for if it is not, Dale's expulsion therefrom -- even if motivated solely by discriminatory animus -- would not constitute a violation of the LAD. The fundamental legal and constitutional issues would be identical if BSA was expelling its members on the basis of race or other grounds prohibited by the LAD. In determining that BSA is, in fact, a public accommodation under New Jersey law, the Supreme Court of New Jersey weighed all of the appropriate factors and correctly applied New Jersey's facially neutral civil rights statute in furtherance of the State's compelling state interest.

New Jersey's interest in fighting discrimination is particularly compelling in this case, where the discriminatory conduct in question bears the imprimatur of government

endorsement. Even without the apparent endorsement of government, status-based discrimination in accommodations offered to the public is abhorrent. *See, e.g., Runyon v. McRary*, 427 U.S. 160 (1976) (small schools denying admission to children solely on the basis of race); *Roberts, supra*, 468 U.S. at 628 ("acts of invidious discrimination in the distribution of publicly available goods, services and other advantages cause unique evils that government has a compelling interest to prevent -- wholly apart from the point of view such conduct may transmit"). Such discrimination unquestionably offends individual dignity and stigmatizes affected citizens. *Id.* at 625. Invidious discrimination also harms society as a whole by denying the benefits of wide participation in political, economic and cultural life. *Id.*

The pernicious effects of discrimination, and the costs to society as a whole, are even greater when the discriminating organization enjoys the perception of government endorsement. Discrimination that carries the perceived imprint of government support sends a cruel message to an individual that he or she is an unequal, and indeed inferior, member of society. As noted by the New Jersey Supreme Court, BSA's publications prominently feature information highlighting BSA's longstanding and ongoing "special association" with government. *Dale, supra*, 734 A.2d at 1212. Because BSA enjoys an uniquely high level of government support, along with many other public attributes, New Jersey has a particularly compelling interest in ensuring non-discriminatory access to its accommodations, advantages, facilities and privileges in this case.

In its analysis, the court below correctly applied the LAD to accomplish the State's legitimate purposes without impermissibly abridging BSA's free speech or associational freedom. On its face, the LAD does not aim at the suppression of speech, nor does it distinguish between prohibited and permitted activity on the basis of viewpoint. Instead, the LAD reflects New Jersey's strong historical

commitment to eliminating discrimination and assuring its citizens equal access to public accommodations. That goal, which is unrelated to the suppression of expression, "plainly serves compelling state interests of the highest order." *Roberts, supra*, 468 U.S. at 624. Furthermore, as demonstrated above, because BSA recruits broadly and unselectively in its membership while receiving widespread government benefits and sponsorship, its action and policies bear a stamp of legitimacy, an imprimatur based on government's tacit endorsement. Under the circumstances, New Jersey's compelling interest is undeniable.

B. Because BSA is large, nonselective, and inclusive, and its members do not gather for the purpose of sharing personal views on sexual orientation, application of the New Jersey Law Against Discrimination does not violate Petitioners' right of intimate association.

The New Jersey Supreme Court correctly rejected BSA's claim that its decision to discriminate against Dale based solely on his sexual orientation is protected by the First Amendment freedom of intimate association. At the core of the right to intimate association is the right of individuals to form and preserve certain kinds of highly personal relations and afford them "a substantial measure of sanctuary from unjustified interference by the State." *Roberts, supra*, 468 U.S. at 618. Such personal bonds are characterized by the cultivation and transmission of shared ideals and beliefs. Protecting these intimate unions, the Court has said, fosters diversity and acts as a critical buffer between the individual and the power of the State. *Id.* at 618-19.

Family relations are often used as a model of these intimate associations because they normally involve deep attachments and commitments among small groups of people who share distinctly personal aspects of their lives. *Id.* at 619-20. With regard to the types of relationships protected under the freedom of association, this Court has observed:

> Among other things, . . . they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of the freedom of association as an intrinsic element of personal liberty. Conversely, an association lacking these qualities -- such as a large business enterprise -- seems remote from the concerns giving rise to this constitutional protection. [*Id.* at 620.]

Thus, in determining whether a group is an intimate association, "factors that may be relevant include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." *Id.*

Following *Roberts*, this Court considered another case in which the same right was being asserted for the same purpose -- excluding women from membership. *Rotary Club of Duarte*, *supra*, 481 U.S. at 539. After noting that local Rotary groups vary in size from as few as 20 to as large as 900 or more, the Court observed that the organization's stated purpose "is to produce an inclusive, not exclusive, membership, making possible the recognition of all useful occupations, and enabling the club to be a true cross section of the business and professional life of the community." *Id.* at 546. Considering the significance of the club's community projects, the attendance and participation of strangers at club meetings and the diversity of club members from varied professions, the Court found lacking "the kind of private or personal relationship to which [the Court has] accorded protection under the First Amendment." *Id.* at 547. *See also New York State Club Assoc.*, *supra*, 487 U.S. at 6 (private clubs' right of intimate association not violated by anti-

discrimination ordinance because plaintiff clubs regularly provided commercial services to nonmembers, a factor at least as important as the participation of strangers at meetings in *Roberts* and *Rotary*).

Application of the pertinent factors identified by this Court to the facts at issue leads inevitably to the conclusion reached by the New Jersey Supreme Court, that BSA is not an intimate association protected by the First Amendment. The record below amply supports this conclusion. For instance, the Court found on the record before it that BSA is large in its overall size (4 million boys and over 1 million adults admitted), is nonselective in its membership, has an inclusive rather than an exclusive purpose, and routinely invites nonmembers to participate in scout functions. *Dale*, *supra*, 734 A.2d at 1219-26. As noted above, BSA itself has "quite clearly said that 'any boy' is welcome." *Id.* at 1221.

BSA counters that when an organization has both a national entity and local groups, the focus should be exclusively on the local groups. Pet. bf. at 39. In this regard, BSA claims that some local troops have between 15 and 30 members, and that these local troops "are involved in the transmission and cultivation of shared ideals and beliefs." Pet. bf. at 39-41. Size, however, is not dispositive. In *Rotary Club*, *supra*, 481 U.S. at 546, for example, this Court specifically held that a local club with as few as twenty members did not qualify as "the kind of intimate or private relation" that warrants First Amendment protection. Furthermore, on the question of exclusivity, this Court has "emphasized that the First Amendment protects those relationships . . . that presuppose 'deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs but also distinctly personal aspects of one's life.'" *Id.* at 545 (quoting *Roberts*, *supra*, 468 U.S. at 619-20).

Here, the record is devoid of any evidence indicating that scouts gather at either the national or local level for the purpose of sharing personal views on sexual orientation. To the contrary, BSA has a well-defined policy discouraging formal discussion of sexual topics during scouting activities, and believes that such matters are better addressed by scouts' parents, consistent with their varying spiritual beliefs. *Dale*, *supra*, 734 A.2d at 1203 (quoting Boy Scouts Handbook at 528 (10th ed. 1990)). Moreover, it is beyond dispute that BSA actively recruits members from all walks of life to create an atmosphere of diversity. As in *Rotary*, BSA's goal is to create inclusive, not exclusive membership. *Id.* at 1222. Further, as discussed above, it is undisputed that BSA routinely invites nonmembers to participate in scout functions. This Court emphasized in *Rotary*, *supra*, 481 U.S. at 547, that an association's frequent inclusion of nonmembers in its core activities is an important factor weighing against an intimate association claim.

Based on, among other factors, BSA's proclaimed commitment to diversity and its inclusive and open membership practices, the New Jersey Supreme Court correctly concluded that Boy Scouts of America has failed to demonstrate a protectable intimate association right at either the national or local troop level. To allow such a large, diverse and inclusive organization like BSA, with extensive ties to all levels of government, to assert a right of intimate association would severely undermine New Jersey's anti-discrimination efforts on behalf of all of New Jersey's statutorily protected citizens.

C. Application of the New Jersey Law Against Discrimination to BSA, a Place of Public Accommodation, Does Not Abridge Petitioners' First Amendment Right to Expressive Association.

On its face, BSA's most compelling argument is that application to it of the LAD would abridge its right of expressive association under the First Amendment. Likening Dale's situation in this case to that of the gay and lesbian organization which sought to express gay pride by marching in the Saint Patrick's Day parade in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 572-73 (1995), BSA argues that inclusion of Dale will significantly "impair the ability of the original members to express only those views that brought them together." *Roberts*, *supra*, 468 U.S. at 628. The "very argument that government may impose its own interpretation on an organization's moral message," BSA argues, "raises First Amendment concerns of the highest order." Pet. br. at 25-26.

The superficial appeal of these arguments is not difficult to understand, for they strike a deep chord in the American sensibility. Why should government be able to dictate to private organizations whom they must include, particularly when inclusion will frustrate the core message of that organization?

The record below and the history of BSA disconnect it fatally, however, from the rhetoric it now invokes. First, unlike the organization that sponsored the parade in *Hurley*, BSA is not engaged in wholly private or wholly expressive activity. This Court in *Hurley* noted explicitly "that no state action is involved in the parade." *Hurley*, *supra*, 515 U.S. at 566. That simply cannot be asserted here, given the level of government sponsorship and assistance to which BSA has availed itself. Indeed, the charters of 750 local boy scout units are held by government entities which are prohibited by

the LAD from engaging in precisely the kind of discrimination the BSA now allegedly espouses. Furthermore, no argument at BSA's disposal converts BSA -- a membership organization -- into a form of pure expression like the parade in *Hurley*.

Second, even assuming that an anti-homosexual "moral message" lies at the core of what brought BSA together, there is simply no evidence that Dale, unlike the gay organization in *Hurley*, sought inclusion in the BSA in order to express a message inimical to the organization's founding principles. The decision to exclude Dale, in other words, implicated no contrary expressive conduct on his part. That his sexual orientation never affected his conduct as a Boy Scout is evident from the fact that no one ever knew of his orientation until it was revealed in an article that never mentioned his status as an elite Boy Scout.

But there is a more fundamental point. BSA itself concedes that a significant percentage of its membership disagrees with the anti-homosexual position it advances with this Court. Pet. br. at 26, n.7; Reply Pet. Cert. at 8 & n.6; *see also Dale*, *supra*, 734 A.2d at 1203. That dissension is not surprising, for BSA's claim, in effect, that it is organized to discriminate against homosexuals simply does not bear scrutiny, no matter how deferential this Court chooses to be.

By its own terms, BSA was and is organized "to teach boys how to do things for themselves and other people . . . and to learn to be good citizens." Boy Scouts of America, The Boy Scout Encyclopedia 22 (B. Grant ed. 1952). BSA awards merit badges for those who exhibit good citizenship; significantly, and not surprisingly given BSA's strong association with government, the question of what makes a good citizen is left to public policy as defined by government. Thus, the good citizen dedicates himself to: "be familiar with the Declaration of Independence, the Constitution . . . and the Bill of Rights . . . respect and obey the law . . . [and] deal

fairly and kindly with my fellow-citizens of whatever race or creed, in opportunity." *Id.* at 39-40.

The "law" which scouts are duty-bound to respect has been defined by New Jersey government to forbid precisely the discrimination based on sexual orientation that BSA so strongly espouses in the context of this litigation. How are scouts to "respect" such a law, when they are instructed that it is inimical to their core mission? How can scouts be said to honor America's "tradition of equality of opportunity" when they seek now to deny equal opportunity themselves to people the law otherwise protects?

The original BSA ideals of inclusiveness, tolerance and of the "good citizen," who acts with respect for and in deference to American law and the ideal of equal opportunity, simply cannot be squared with BSA's recently discovered aversion to its homosexual members. Aside from some selectively distributed position papers, whose contents are nowhere reflected in BSA public literature and most of which were drafted in response to litigation, BSA has never articulated a position on sexual orientation. *See, e.g., Dale, supra,* 734 A.2d at 1205, n. 4, 1224-25; Goodman, *A Scout is Morally Straight, Brave, Clean, Trustworthy . . . and Heterosexual? Gays in the Boy Scouts of America*, 27 HOFSTRA LAW REVIEW 825, 881 (1999). In fact, BSA discourages its leaders from disseminating any views at all on sexual issues. *Dale*, *supra*, 734 A.2d at 1203.

From its inception, BSA has identified its goals with the goals underpinning American government and society generally. The boy scout "studies the democratic principles on which America is based in his Citizenship Merit Badges. Scouting is open to all boys of every race and religious belief, just as America welcomes all on a democratic basis." Boy Scout Encyclopedia, *supra*, at 47. This close identification of scouting goals with the governmental policies that led to civil rights protection of sexual orientation was not something

foisted upon BSA by "big brother" government; it was a policy the BSA itself embraced freely, and it enabled BSA to avail itself of government sponsorship, facilities, and amenities without conflict. In applying its public policy forbidding discrimination based on sexual orientation to BSA now, New Jersey is not, therefore, as BSA claims, imposing "its own interpretation on an organization's moral message." That organization long ago identified its own moral message with the principles of American government that led to protection of the sexual orientation of men like James Dale.

The State of New Jersey over the past fifty years has come to reflect the widening moral arc of tolerance, an ideal at the heart of Boy Scout beliefs. BSA's insistence now that tolerance ends where sexual awakening begins in some of its members is tragic, not only because it places BSA at odds with the government with which it so strongly identifies, and not only because it casts out certain young men at the most vulnerable time of their lives, but also because, in doing so, it forsakes the bedrock commitment of the Boy Scout citizen to embody the progress of America; "I will do all in my power to pass on a better America to the next generation." *Id.* at 40.

BSA has failed to demonstrate that it has a clearly expressed interest as an association in excluding homosexuals, or that inclusion of James Dale would frustrate the expressive purpose underlying scouting. Even assuming that such inclusion would burden BSA's expressive association rights, the State of New Jersey's compelling need to enforce its law against discrimination against broadly based entities which are closely identified with government clearly outweighs BSA's rights of expressive association.

CONCLUSION

For the foregoing reasons, the judgment of the New Jersey Supreme Court should be affirmed.

Respectfully submitted,

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Dated: March 29, 2000

APPENDIX

APPENDIX

EXCERPTS FROM THE BOY SCOUT ENCYCLOPEDIA

Text and illustration prepared under the direction of THE BOY SCOUTS OF AMERICA

Text by BRUCE GRANT

Illustrations by FIORE and JACKIE MASTRI

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Page 3. "The material for these articles has been carefully selected from many different sources. Mr. Bruce Grant has done a splendid job in developing the text, and the lively illustrations of Fiore and Jackie Mastri enhance its value. Expert Scouters have carefully reviewed the material so that you may rely on the accuracy of what you find here. THE BOY SCOUT ENCYCLOPEDIA is not intended to be a basic handbook, but to present a panorama of the Scout program as carried on by millions of boys throughout the United States, and indeed, the world."

Page 22. "Boy Scouts of America. A national organization chartered by Congress to teach boys how to do things for themselves and other people, to train them in Scoutcraft and teach them patriotism, courage, and self-reliance, to help them be physically fit and to develop the kind of strong character they admire, and to learn to be good citizens. Boys of every religious faith can join."

Page 39. "Citizenship Dedication. Exploring is the trail to citizenship. In whatever way it leads the young man to serve his community, it makes him more able to have or enjoy citizenship in common with others and makes him better trained for a voting citizenship when he becomes of age. The Explorer citizen dedicates himself to the following: 1. I will

live the Scout Oath and Law. 2. I will be familiar with the Declaration of Independence, the Constitution of the United States, and the Bill of Rights. 3. I will respect and obey the law in order to have security and freedom. 4. I will share the responsibility of my home, school, church, neighborhood, and community; and when legally of age, I will register and vote in all elections. 5. I will deal fairly and kindly with my fellow-citizens of whatever race or creed, in the spirit of the Scout Law and America's tradition of equality of opportunity. 6. I will work to preserve our American heritage of liberty and responsibility. I acknowledge that the privileges we enjoy were won by the hard work and sacrifices, faith and clear thinking, of our forefathers. I will do all in my power to pass on a better America to the next generation."

Page 47. "[The Scout] studies the democratic principles on which America is based in his Citizenship Merit Badges. Scouting is open to all boys of [e]very race and religious belief, just as America welcomes all on a democratic basis."